

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 14, 2007

JAMES W. CLARK, JR. v. WAYNE MEDICAL CENTER, ET AL.

**Appeal from the Circuit Court for Wayne County
No. 3914 Stella Hargrove, Judge**

No. M2005-00699-COA-R3-CV - Filed on May 31, 2007

Inmate filed medical malpractice action against Hospital and Doctor alleging that Defendants negligently diagnosed and failed to treat his fractured mandible. The trial court granted Defendants' motions for summary judgment. Inmate appeals the dismissal of his Complaint against Doctor and other related errors. We affirm the judgment of the trial court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

James W. Clark, Jr., *pro se*.

M. Todd Sandahl, Franklin, Tennessee, for the appellee Hubert Langley, M.D.

OPINION

On November 27, 2002, Mr. James Clark, an inmate at South Central Correctional Facility (SCCF) in Clifton, Tennessee, was allegedly assaulted by a fellow inmate. Mr. Clark was taken to medical segregation at SCCF the following day for treatment of his injuries. Due to concerns over the injury to his jaw, Mr. Clark was transported to Wayne Medical Center (WMC) on November 29, 2002. While at WMC, x-rays were taken of Mr. Clark's mandible. Dr. Hubert Langley interpreted those x-rays as negative for a fracture and discharged Mr. Clark to SCCF.

However, Mr. Clark continued to experience pain related to his mandible. On January 13, 2003, Dr. Keith Birdyshaw, a dentist at SCCF, took another x-ray of Mr. Clark's mandible which allegedly revealed a fracture. The same fracture was again allegedly present in an x-ray taken by Dr. William Hunter, an oral surgeon, on February 21, 2003. On April 28, 2003, Mr. Clark was transported to Meharry Medical College where Dr. Ray Bennett concurred in the diagnosis of Drs. Birdyshaw and Hunter.

On August 8, 2003, Mr. Clark filed a medical malpractice action against WMC and “Physician Dr. John Doe.” In October 2003, Mr. Clark discovered that “Dr. John Doe” was Dr. Langley and he later amended his Complaint accordingly. On November 23, 2004, Mr. Clark filed a motion requesting the court to serve subpoenas for depositions, however, Mr. Clark’s subpoenas were not filed until January 6, 2005.

On April 21, 2004, WMC filed a motion for summary judgment alleging that it did not deviate from the applicable standard of care and it was not vicariously liable for the alleged acts or omissions of Dr. Langley. On December 29, 2004, Dr. Langley also filed a motion for summary judgment alleging that Mr. Clark had failed to show by expert testimony the standard of care, that Dr. Langley deviated from the standard of care, and that Dr. Langley’s deviation was the proximate cause of Mr. Clark’s injuries. On February 11, 2005, the trial court granted WMC and Dr. Langley’s motions for summary judgment and dismissed all of Mr. Clark’s claims with prejudice. On February 23, 2005, Mr. Clark filed a motion to alter or amend the judgment, which the court denied on March 1, 2005.

Mr. Clark appeals to this Court arguing that the trial court erred in (1) denying him the opportunity to obtain depositions prior to granting Dr. Langley’s motion for summary judgment; (2) granting Dr. Langley’s motion for summary judgment; (3) dismissing his case with prejudice; and (4) denying his motion to alter or amend the judgment.

I. FAILURE TO ALLOW PROCUREMENT OF DEPOSITIONS

On December 16, 2004, Mr. Clark filed a motion for summary judgment against Dr. Langley. Dr. Langley responded to the motion by filing his own motion for summary judgment on December 29, 2004. The court scheduled a hearing on both motions on January 27, 2005. Mr. Clark contends that it was error for the trial court to grant Dr. Langley’s motion for summary judgment without first allowing him the opportunity to obtain the depositions of Drs. Birdyshaw and Hunter. Decisions regarding pre-trial discovery matters rest within the sound discretion of the trial court and therefore will not be reversed on appeal absent a clear abuse of discretion. *Benton v. Snyder*, 825 S.W.2d 409, 416 (Tenn.1992).

Tenn. R. Civ. P. 56.04 provides that a motion for summary judgment “shall be served at least thirty (30) days before the time fixed for the hearing.” The Tennessee Supreme Court has held that the purpose of Rule 56.04 is to allow the opposing party time in which to file discovery depositions and affidavits as well as to provide a full opportunity to amend. *Craven v. Lawson*, 534 S.W.2d 653, 655 (Tenn.1976). “[W]here there is the slightest possibility that the party opposing the motion for summary judgment has been denied the opportunity to file affidavits, take discovery depositions or amend, by the disposition of a motion for summary judgment without a thirty (30) day interval following the filing of the motion, it will be necessary to remand the case to cure such error.” *Craven*, 534 S.W.2d at 655.

In this case, Dr. Langley's motion for summary judgment was heard twenty-nine (29) days after the filing of the motion. However, Mr. Clark filed his own motion for summary judgment forty-nine (49) days prior to the hearing. It has been held that a failure to comply with Rule 56.04 does not require that a grant of summary judgment be set aside where there is no indication that the nonmoving party opposed the hearing within the thirty (30) day period, requested a continuance, or was prejudiced by the hearing. *Teachers Ins. & Annuity Ass'n v. Harris*, 709 S.W.2d 592, 595 (Tenn.Ct.App.1985). Mr. Clark does not allege that he opposed the hearing nor that he requested a continuance which was denied by the court. And because Mr. Clark had forty-nine (49) days in which to prepare for his motion for summary judgment, we cannot say that he was prejudiced by arguing Defendants' motion the same day, even though the hearing took place one day prior to the thirty (30) day period.

II. SUMMARY JUDGMENT

Mr. Clark next argues that the trial court erred in granting Dr. Langley's motion for summary judgment. In reviewing a motion for summary judgment, this Court must examine all the evidence and all reasonable inferences from the evidence in the light most favorable to the non-moving party. *Kelley v. Middle Tenn. Emergency Physicians, P.C.*, 133 S.W.3d 587, 591 (Tenn.2004). We review a grant of summary *de novo* upon the record with a presumption of correctness afforded to the findings below. *Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn.2000). Summary judgment is only appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Tenn.R.Civ.P. 56.03.

The burden of proof a plaintiff must meet in order to maintain a cause of action for medical malpractice is outlined in Tenn. Code Ann. § 29-26-115(a), which states:

(a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):

(1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;

(2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

(3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

In this case, Dr. Langley's motion for summary judgment was supported by his own affidavit which stated in pertinent part:

5. It is my professional opinion, within a reasonable degree of medical certainty, that the case and treatment provided by me to this patient was in full compliance with the recognized standard of acceptable professional practice in the profession of medicine as that standard existed in Waynesboro, Tennessee in 2002. It is further my professional opinion, within a reasonable degree of medical certainty, that the patient's injuries are not attributable to any alleged negligent act or omission on my part.

Dr. Langley's attached affidavit therefore affirmatively negated two essential elements of Mr. Clark's claim and shifted the burden to Mr. Clark to rebut Dr. Langley's expert proof. In response to Dr. Langley's motion, Mr. Clark submitted his own affidavit, the affidavits of Dr. Nancy Armetta and Ms. Shirley Harder, and various medical records. However, none of these documents addressed the standard of care, Dr. Langley's alleged deviation from that standard, or proximate causation. It is well settled that expert testimony is required to establish the standard of care, a deviation from the standard of care, and proximate causation in all medical malpractice actions except those in which the alleged negligence is within "the common knowledge of laymen." *Phelps v. Vanderbilt Univ.*, 520 S.W.2d 353, 357 (Tenn.Ct.App.1974). However, only the most obvious forms of negligence fall within the common knowledge exception. *Ayers by Ayers v. Rutherford Hosp., Inc.*, 689 S.W.2d 155, 160 (Tenn.Ct.App.1984).

The Tennessee Supreme Court has stated that "in those malpractice actions wherein expert testimony is required to establish negligence and proximate cause, affidavits by medical doctors which clearly and completely refute plaintiff's contention afford a proper basis for dismissal of the action on summary judgment, in the absence of proper responsive proof by affidavit or otherwise." *Bowman v. Henard*, 547 S.W.2d 527, 531 (Tenn.1977). Because the alleged malpractice in this case is not within "the common knowledge of laymen" and because Mr. Clark failed to submit any expert testimony rebutting Dr. Langley's affidavit, we find that the trial court properly granted Dr. Langley's motion for summary judgment.

III. ENTRY OF JUDGMENT

Mr. Clark also alleges that the trial court violated Tenn. R. Civ. P. 58 by failing to mail him a copy of the order granting Dr. Langley summary judgment. Tenn. R. Civ. P. 58 states:

Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry:

- (1) the signatures of the judge and all parties or counsel, or
- (2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or

(3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

Following entry of judgment the clerk shall make appropriate docket notations and shall copy the entry of judgment on the minutes, but failure to do so will not affect validity of the entry of judgment. When requested by counsel or pro se parties, the clerk shall forthwith or deliver a copy of the entered judgment to all parties or counsel. If the clerk fails to forthwith mail or deliver, a party prejudiced by that failure may seek relief under Rule 60.

A certificate of service signed by Dr. Langley's counsel verifies that a copy of the proposed order granting Dr. Langley summary judgment was mailed to Mr. Clark on February 3, 2005, before it was entered by the court. Even if we assume that Mr. Clark was not mailed a copy of the order, there is no evidence of prejudice since Mr. Clark timely filed his appeal. We would also note that the remedy for a failure to comply with Tenn. R. Civ. P. 58 is not an invalidation of the judgment but rather a Rule 60 motion.

Mr. Clark further argues that the trial erred in dismissing his Complaint with prejudice. When a trial court rules on a defendant's motion for summary judgment and the plaintiff is unable to demonstrate that there are any material facts in dispute requiring a trial, a trial court properly resolves the case by dismissing the complaint with prejudice. *Hartman v. LeCorps*, No. 89-188-II, 1989 WL 115181, at *5 (Tenn.Ct.App. Oct. 4, 1989). We therefore find that the trial court correctly resolved this case and dismissed the Complaint.

IV. MOTION TO ALTER OR AMEND

Mr. Clark lastly contends that the trial court erred in denying his motion to alter or amend the judgment. When additional evidence is submitted in support of a motion to alter or amend a grant of summary judgment, the trial court should consider the following factors:

1) the movant's efforts to obtain evidence to respond to the motion for summary judgment; 2) the importance of the newly submitted evidence to the movant's case; 3) the explanation offered by the movant for its failure to offer the newly submitted evidence in its initial response to the motion for summary judgment; 4) the likelihood that the nonmoving party will suffer unfair prejudice; and 5) any other relevant factor.

Harris v. Chern, 33 S.W.3d 741, 745 (Tenn.2000).

In this case, the only additional evidence submitted by Mr. Clark in support of his motion to alter or amend the judgment was an illustration of a human skull excerpted from a medical textbook reflecting the area in which Mr. Clark's injuries occurred. Because Mr. Clark failed to present any expert testimony establishing negligence and proximate cause, we find no error in the trial court's denial of Mr. Clark's motion to alter or amend the order granting Dr. Langley summary judgment.

The judgment of the trial court is affirmed and costs of appeal are assessed against Mr. Clark.

WILLIAM B. CAIN, JUDGE